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# Supreme Court of the United States

**OCTOBER TERM, 1946**

No. 625

PETER CALDAROLA, (Plaintiff-Appellant in the Court below),
*Petitioner-Appellant,*

*—against—*

MOORE-McCORMACK LINES, INC.,
*Defendant,*

*—and—*

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co., (Defendants-Respondents in the Court below),
*Respondents-Appellees.*

## REPLY BRIEF FOR PETITIONER-APPELLANT

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## REPLY BRIEF FOR PETITIONER-APPELLANT

### Note

Petitioner's cause of action does not rest upon the claim that the respondents were the operators of the vessel. (Although in fact they were.) Petitioner's contention appears in the opinion of the Court of Appeals in the case at bar, 295 N. Y., page 466, wherein the Court stated:

"Plaintiff sued defendants-respondents Eckert, alleging and attempting to prove that those defendants were so much in possession and control of the ship, at the time of the accident, as to make them responsible to third persons lawfully on board, for injuries caused by unsafe conditions on the ship."

Petitioner does not claim that any member of the crew was guilty of negligence or that the respondents were his employers. Petitioner has throughout this litigation contended that pursuant to Article 14 of the Agency Agreement (R. 349), the respondents were under a duty to maintain the vessel in a good condition of repair and that they were in possession and control of the vessel sufficient to make repairs. Petitioner has never changed his position (R. 98, 99, 102, 103).

The majority opinion in the *Hust* case held that the general agent was the employer of Hust. Mr. Justice Reed, in a dissenting opinion, disagreed with this contention. Mr. Justice Reed, however, did not disagree with the proposition that the general agent would be responsible for his own tort.

On page 747 Mr. Justice Reed stated:

"There is no reason here why the petitioner could not sue respondent for its alleged tort. What petitioner is attempting is to hold respondent liable as employer for negligence of petitioner's fellow servants, of petitioner's superiors, or the master under Merchant Marine Act. This it cannot do under this record."

On page 748 Mr. Justice Reed stated:

"Certainly Hust did not lose his remedies

against the agent for the agent's torts. He still has those remedies but petitioner (Hust) wishes to hold the agent as an employer."

**The Court of Appeals was in error when it decided that the respondents were not in possession, and had no custody of the vessel.**

The Court of Appeals in affirming the decision of the Appellate Division, found that under the General Agency Agreement (Exhibit 1, R. 337 to 356), and the Rules and Regulations issued by the War Shipping Administration, after Plaintiff's Exhibit 1 had been entered into, which is marked Plaintiff's Exhibit 8 (R. 358 to 363), and Defendants' Exhibit 6, a book containing photostatic copies of orders and regulations issued by the War Shipping Administration, and which has been submitted to this Court, *the respondents were to conduct the ship's business, as distinguished from its physical operation.*

While it is not always a simple matter to distinguish acts which refer to the ship's business from the duties which make up the physical operation of the vessel, yet in the main, the line of demarkation is clearly visible. The attorneys for the respondents have defined the activities making up the ship's business. This appears on page 11 of their brief and with a portion of it we are in accord. It is stated:

"A vessel's business includes such activities as the solicitation of the bookings of passengers and cargo; the purchase of food, victuals and supplies; the keeping of records; the collection and disbursement of money . . . ."

We intend to cite further excerpts from Defendants' Exhibit 6, a book containing photostatic copies of orders and regulations issued by the War Shipping Administration and filed with this Court, which will show that the respondents exercised a most substantial measure of physical control over the vessel.

1. On page 35 of the Defendants' Exhibit 6, a book containing photostatic copies of orders and regulations issued by the War Shipping Administration, operations, regulation No. 63, provides as follows:

> "Effective with the next signing of articles, general agents of all vessels presently employing a clerk typist are directed to employ instead a junior assistant purser at a basic monthly salary of $120.00."

The contention of the respondents has always been that they did not hire members of the ship's personnel, but simply supplied them to the master to be hired by the master. The above regulation number 63 shows that the respondents did the hiring.

2. On page 70 of the Defendants' Exhibit 6, operations, regulation No. 9, provides:

> "General agents of War Shipping Administration are authorized and directed to employ as a member of the crew of each E. C. 2 liberty type vessel one junior third mate subject to the following conditions."

This is another illustration where the master did not hire a member of the crew, but the agent did.

3. On page 10 of the Defendants' Exhibit 6 opera-

tions, regulation No. 20, provides:

> "Agents and general agents are further instructed to follow the directions and authorizations as issued by the district directors * * *.
>
> 2. reports of crew problems including shortage of personnel, insubordination, complaints, disputes, and like matters * * *."

The above direction to the general agents to handle insubordination, shortage of crew personnel and disputes on board the vessel shows clearly that the agents' duties were not confined to conducting the ship's business only, but contrary to the Court of Appeals decision, they were concerned in the physical operation of the ship.

4. On page 15 of the Defendants' Exhibit 6, operations, regulation No. 42, provides:

> "It has come to the attention of the War Shipping Administration that in many instances floor plates in engine rooms and fire rooms, removed for various reasons and replaced, are not secured by replacing the bolts and nuts. This practice might result in death or serious injury to members of the engine room personnel by the insecure plates flying through the air when vessels are subjected to enemy attacks. In the interest of safety of the ship's personnel and the morals of crews, agents and general agents of War Shipping Administration vessels are, therefore, directed to instruct the master and chief engineer aboard each vessel to ascertain prior to proceeding to sea the condition of the floor plates * * *."

5. On page 40 of the Defendant's Exhibit 6, operations, regulation No. 76, provides:

> "Agents and general agents of War Shipping Administration are directed to post the following notice on the bulletin boards of all vessels for the information of merchant marine personnel. In the event of the sinking of a vessel through enemy action, the attacking warship commander may attempt to question crew members who have taken to the lifeboats. In many instances masters and other key seagoing personnel have been taken prisoners. For this reason crew members should not disclose the presence of any officers in the lifeboats. In the rules set forth under the Geneva Convention of 1929, a prisoner of war is not required to give any information other than his name, date of birth, rank or rating and the name and address of his next of kin."

6. On page 14 of the Defendants' Exhibit 6, operations, regulation No. 41, it is provided:

> "Agents and general agents of War Shipping Administration vessels are directed to issue instructions to all vessels regarding the following formalities which are required by the Ministry of Marine of Brazil. * * * War and merchant vessels used as auxilaries and transports under the command of naval observers and having aboard a doctor may dock immediately as long as there exists aboard no suspect of illness, and the ship's doctor should personally deliver to the Port Health Authorities an advice that the ship is not a carrier of infectious or contagious diseases."

7. On pages 31 and 32 of the Defendants' Exhibit 6,

operations, regulation No. 58, it is provided:

> "Each agent and general agent is directed to make known these regulations to the ship's masters and to instruct them to comply therewith * * * all army personnel aboard the vessel whether or not they have been detailed for service thereon in the manner above stated, shall be subject to the orders of the transport commander, who will be charged with their care and discipline."

8. On page 23 of the Defendants' Exhibit 6, operations, regulation No. 55, it is provided:

> "General agents of American flag vessels owned by or under Bareboat Charters to the War Shipping Administration are directed to attach to all articles of such vessels which are hereafter opened the following rider: * * * It is agreed that the masters, officers and members of the crew shall be furnished the war risk insurance protection covering loss of life, disability * * *."

The foregoing shows clearly that the respondents' duties did not refer merely to the ship's business, but rather, to the ship's crew operating the vessel.

9. On page 361 of the record on appeal, Plaintiff's Exhibit No. 8, it is provided:

> "Subject to the foregoing, general agents shall:
>
> (a) Determine the repairs necessary.
>
> (e) Place in hand and award contracts for repairs.

(f) Supervise to completion irrespective of the amount to be expended, all maintenance and insurance repairs including the requirements of the Classification Society and Bureau of Marine Inspection and Navigation * * *."

We have referred to Exhibit 8 because the respondents contend that they were authorized to spend a certain amount for repairs on a vessel during one voyage. The Plaintiff's Exhibit No. 8 referred to shows that the respondents were not limited in any amount in awarding contracts for repairs.

10. On pages 128, and 90 of the record on appeal, Captain Bols of the vessel involved in the occurrence testified that when he went ashore after the ship's journey, he called up his office, meaning the office of the respondents. If in fact the respondents were not the captain's superior, the Captain would not have said that as soon as the vessel docks, he calls up his office.

Mr. Justice Douglas, in his concurring opinion in *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S., pages 734, 735, has referred to Article 12 of Plaintiff's Exhibit 1 (R. 337 to 356), a portion of which is as follows:

"In case of termination of this agreement, whether upon expiration of the stated period hereof or otherwise, all vessels and other property of whatsoever kind then in the custody of the general agent pursuant to this agreement shall be immediately turned over to the United States, at times and places to be fixed by the United States * * *."

The attorneys for the respondents, realizing that such a clause in the agreement places the vessels in the custody of the respondents, have attempted to avoid the implication of such a clause. They say on page 30 of their brief:

> "In understanding these clauses it is necessary to have in mind that there are occasions when vessels do not have any masters at all. Indeed, there are times when they do not have crews. The latter occurs when they are in laid-up status. The general agency agreement, therefore contemplated that when this should occur general agents would have temporary custody of vessels."

We believe the foregoing to be wishful thinking.

The Court will note that Article 12 referred to speaks about the disposition of the vessels *at the termination of the contract.* The parties assumed that all vessels under the agency agreement were to be in the custody of the general agent, otherwise Article 12 would not have provided:

> "In case of termination of this agreement, whether upon expiration of the stated period hereof or otherwise, all vessels and other property of whatsoever kind then in the custody of the general agent pursuant to this agreement shall be immediately turned over to the United States, at times and places to be fixed by the United States . . ."

If as contended by the respondents, the United States Government had at all times custody of the vessel, and the respondents, as general agents had not, we cannot conceive of a situation where the respondents would

suddenly become custodians. Whatever rights or obligations existed between the parties are contained in the written agreement and the rules and regulations.

If the United States and the general agent had agreed that the general agents were to be the custodian of the vessels during the life of the agreement, it is but reasonable to assume that the parties would have provided a method of turning back the vessels to the Government when the agreement was terminated. The United States and the general agent knowing that all vessels were to be in the custody of the general agent naturally provided that *at the termination of the contract the vessels which had been in the custody of the general agent were to be turned back to the United States Government.*

It was assumed by the parties that the vessels were at all times to be in the custody of the agent up to the termination of the contract. *Article* 12 *provided that the termination of the contract, then and only then was the custody of the vessels to be transferred from the general agent to the United States Government.*

**Where custody and control exists the general agent is liable irrespective of whether the tort constitutes non-feasance or mis-feasance.**

The Appellate Division reversed the judgment in favor of the petitioner by a vote of 3 to 2. In writing its opinion on page 11 of the Additional Papers to the Court of Appeals, the Appellate Division stated:

> "The distinction between mis-feasance and non-feasance may be unimportant related to one in control of property who has a responsibility arising out of control, for the condition of the property and whose failure to repair a dangerous

condition may be regarded as negligent operation of the property * * *."

The Court of Appeals has held that a person out of possession will be deemed to be liable if he has a sufficient measure of control to make necessary repairs to his property. See *Antonsen* v. *Bay Ridge Savings Bank*, 292 N. Y., page 143; *Mollino* v. *Ogden & Clarkson*, 243 N. Y., page 450.

**A private operator acting as a public agent performing a public duty is liable to third persons for his failure to comply with the terms of his contract.**

Much has been stated by counsel for the respondents that any breach of the agent's obligation to make repairs pursuant to Article 14 of the Agency Agreement, Plaintiff's Exhibit 1 (R. 337 to 367), does not inure to the benefit of third persons. Public policy in our opinion would compel a different interpretation. The general agent had certain obligations under the agency agreement and the rules and regulations issued subsequent to the said agreement. These obligations were for the protection of all persons lawfully on vessels. It would not be in the interest of justice for an agent who has failed in his duty to make repairs to assert that he owes no duty to third persons. This Court, in its opinion in the *Hust* case, 66 Supreme Court, page 1218, stated at pages 1226 and 1227:

"Here indeed is the respondent's falacy, for it assumes the case would be controlled by the common law rules of private agency * * * no such obligation of the common law control test can be justified in this temporary situation unless by

inversion of that wisdom which teaches that 'The letter killeth, but the spirit giveth life'."

## The Decision by this Court Involving a Federal Question is Binding Upon a State Court.

The Court of Appeals in its opinion in the case at bar, stated:

> "The majority opinion in the Supreme Court holds only that the Jones Act should be liberally construed so as to give Hust a cause of action thereunder against the 'General Agent'. A concurring opinion by two of the Supreme Court Justices, in the *Hust* case, goes much further and construes the 'General Agency' contract as putting the agent in possession and control of the ship. Since that minority holding is not the holding of the court, we are not bound to follow it nor to decide whether, if it were the decision of the court, we should have to follow it, as being on a question of maritime law or because it is a construction of a contract to which the United States is a party. (See *S. R. A.* v. *Minnesota*, 90 Law. Ed. Advance Opinions, 663, 666)."

The facts in the case of *S. R. A.* v. *Minnesota*, which is reported in 327 U. S., page 558, were entirely different from the facts in the case at bar. In that case the State of Minnesota claimed a lien against real property owned by a citizen of the State of Minnesota. This Court held that the laws of Minnesota governed.

The question involved here is a maritime question and, therefore, a Federal question to be determined by Federal Law. Here, in fact, it is also a constitutional question (Art. 3, Sec. 2). On these questions there

must be uniformity throughout the United States and the Federal construction is enforceable in the State Courts.

> *Knickerbocker* v. *Stewart*, 253 U. S., 149, at p. 160.

Besides, the two agreements considered and construed in the *Hust* case were maritime contracts involving power conferred upon a governmental agency under Congressional laws and constitutional provisions referring to a system of law co-extensive with and operating uniformly in the whole country.

> *Union Fish Co.* v. *Erickson*, 248 U. S., 308, at p. 313.

Moreover, the United States was a party to both agreements. This alone makes the Supreme Court's interpretation binding on all courts. In the most recent case on the subject, *S. R. A.* v. *Minnesota*, 90 L. Ed. 663, at p. 667, 66 S. Ct. 749 (decided March 25, 1946), the Supreme Court says (p. 754):

> "In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally determined by this Court."

## The Trial Court Properly Instructed the Jury on the Issues Involved.

Counsel for the respondents have stated that the Trial Court was in error in its charge to the jury. The Appellate Division and the Court of Appeals of the State of New York merely reversed the plaintiff's judgment and dismissed the complaint. There was no find-

ing by the Appellate Courts that the Trial Court committed error in its charge to the jury. As a matter of fact the Trial Court did charge the jury that there was limited control sufficient to place an obligation upon the respondents to make repairs pursuant to Article 14 of the Agency Agreement (R. 307, 308, 309).

The Court will note that the original order of the Appellate Division reversed petitioner's judgment on the law. (Additional Papers to the Court of Appeals, page 4.) Due to the confusion created by the new Section 602 of the Civil Practice Act, it was necessary to resettle the order and as a result thereof, the Appellate Division made a new order reversing the judgment upon question of fact and law. (See Supplemental Additional Papers to the Court of Appeals, page 6.)

## *CONCLUSION*

**The order of the Court of Appeals should be reversed.**

Respectfully submitted,

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